BROCK LIVESTOCK CO., INC.

IBLA 86-927 Decided February 2, 1988

Appeal from a decision of the Buffalo, Wyoming, Resource Area Office, Bureau of Land Management, approving mineral claimant's bond. W-90187.

Set aside and remanded.

1. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--Stock- Raising Homesteads

   Adjudication of a mineral claimant's bond pursuant to 43 U.S.C. § 299 (1982) does not require a formal hearing on the record in conformity to provisions of the Administrative Procedure Act, 5 U.S.C. § 557 (1982). The landowner's rights to notice and an opportunity to be heard concerning the adequacy of the bond furnished to protect his rights as a property owner are safe-guarded by the right of appeal to this Board.

2. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--Stock-Raising Homesteads

   A mineral claimant's bond given to enable mining on land patented under the Stock-Raising Homestead Act must be executed by all mineral claimants seeking to re-enter the patented lands.

3. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--Stock-Raising Homesteads

   A mineral claimant's bond must identify the claims sought to be entered by a mineral claimant seeking to re-enter SRHA lands, so as to permit BLM to deter mine possible damages to crops, surface improvements, and the grazing value of the land within those claims.

APPEARANCES: Dennis M. Kirven, Esq., Buffalo, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Brock Livestock Company, Inc., has appealed from a decision dated December 23, 1985, issued by the Buffalo, Wyoming, Resource Area Office, Bureau of Land Management (BLM), rejecting Brock's objections to a mineral claimants bond submitted by American Bentonite Corporation (Bentonite) and approving the bond. 1/

On November 4, 1985, Bentonite filed a "Bond for Mineral Claimants" with BLM in the sum of $3,500 to insure against damage caused to the surface estate by development of mineral claims covering 2,191.67 acres of Brock's land. 2/ The surface of the land is owned and controlled by Brock and was patented under the Stock-Raising Homestead Act (SRHA), section 9 of the Act of December 29, 1916, as amended, 43 U.S.C. § 299 (1982).

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1/ The BLM decision describes the Brock-owned lands upon which mining and exploration will be conducted as follows:

T45N, R82W, Section 18: SE 1/4 SW 1/4
Section 19: W 1/2 NE 1/4, E 1/2 NW 1/4, NE 1/4 SW 1/4, NW 1/4 SE 1/4, SE 1/4 SW 1/4, SW 1/4 SE 1/4
Section 30: W 1/2 E 1/2, E 1/2 W 1/2, Lots 3, 4
T44N, R83W, Section 2: N 1/2 SW 1/4, Lot 8, S 1/2 SW 1/4
Section 3: SE 1/4, Lots 8, 9, 10
Section 11: NE 1/4, E 1/2 NW 1/4
Section 12: SW 1/4, S 1/2 NW 1/4, SW 1/4 SE 1/4
Section 13: W 1/2 NE 1/4, NE 1/4 SW 1/4, E 1/2 NW 1/4 NW 1/4 SW 1/4, W 1/2 NW 1/4 ,
Section 14: SW 1/4 NE 1/4, NW 1/4 SE 1/4, N 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4

2/ These claims are described by Brock, as:

"SUBDIVISION	SECTION	TOWNSHIP	H.E. RANGE	SERIAL NO.
SE 1/4 SW 1/4	18	45N	82W	1103641
W 1/2 NE 1/4, E 1/2 NW 1/4	19	45N	82W	1103641
NE 1/4 SW 1/4, NW 1/4 SE 1/4	19	45N	82W	1103641
SE 1/4 SW 1/4, SW 1/4 SE 1/4	19	45N	82W	830359
W 1/2 E 1/2, E 1/2 W 1/2, Lots 3, 4	30	45N	82W	830359
N 1/2 SW 1/4, Lot 8	2	44N	83W	1067501
S 1/2 SW 1/4	2	44N	83W	948550
SE 1/4	3	44N	83W	948550
Lots 8, 9, 10	3	44N	83W	1067501
NE 1/4, E 1/2 NW 1/4	11	44N	83W	948550
SW 1/4, S 1/2 NW 1/4, SW 1/4 SE 1/4	12	44N	83W	970597
W 1/2 NE 1/4, NE 1/4 SW 1/4, E 1/2 NW 1/4	13	44N	83W	970597
NW 1/4 SW 1/4, W 1/2 NW 1/4	13	44N	83W	794906
SW 1/4 NE 1/4, NW 1/4 SE 1/4	14	44N	83W	801391
N 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4"	14	44N	83W	794906

Patents issued under the SRHA contained a reservation to the United States of minerals in the land together with the right to prospect for, mine, and remove them. 3/ The purpose of the bonding provision of the SRHA was to assure compensatory protection to the surface owner. Elmer Silvera, 42 IBLA 11 (1979); A. J. Maurer, Jr., 15 IBLA 151, 155, 81 I.D. 139, 141 (1974). The Department has promulgated a regulation 43 CFR 3814.1, opening SRHA lands to mineral location and entry. 4/

The BLM decision on appeal is framed as a response to a 10-point itemization by Brock of objections to the $3,500 bond furnished by Bentonite. To the objection that the amount of the bond was inadequate, BLM responded that:

> Letters and a map requested and received from American Bentonite, which are attached, clarify both the extent and duration of activities planned by American Bentonite. The bond is limited in its application only to those activities therein described, which outline access, mining and exploration activities to disturb about 91 acres for a period of ten years plus an additional

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3/ Section 9 of the Act provided pertinently that a mining claimant:

"[Slhall have the right at all times to enter upon the lands * * * patented * * * for the purpose of prospecting for * * * mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the * * * patentee, and shall be liable to and shall compensate the * * * patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United states the * * * miNeral deposits in any such land, or the right to mine and remove the same, my reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the * * * minerals, first, upon securing the written consent or waiver of the homestead * * * patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the * * * owner of the land, to secure the payment of such damages to the crops or tangible improvements of the * * * owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate * * *."

Act of Dec. 29, 1916, ch. 9 § 9, 39 Stat. 864, 43 U.S.C. § 299 (1982).

4/ The regulation, 43 CFR 3814.1, provides in pertinent part that "any person who has acquired from the United States * * * mineral deposits in any such land or the right to mine and remove the same, may reenter and occupy the surface."

ten acres (101 acres total) for access and exploration only for the same period of ten years. These areas are shown on the enclosed map. Any additional disturbances by American Bentonite on the aforementioned lands would require that they comply with the regulations as outlined in 43 CFR 3814.1(c).

Other objections raised by Brock alleged probable damage to a watershed and potential damage to a reservoir, stock shelter areas, and protective areas, as well as danger to cultural artifacts, to which complaints BLM responded:

> Bond coverage under 43 CFR 3814 is limited to an amount to cover damages to crops, improvements, and the value of the land for grazing purposes . . .", and ". . . the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation." See IBLA 79-349, Elmer Silvera Et Al., July 25, 1979 [42 IBLA 11] (attached).

Brock objected to the failure of Richard L. Thayer, the owner of an interest in the claims, to sign the bond as a principal. BLM's decision replied that "Mr. Thayer is the general manager of American Bentonite Corporation, the company whose name appears on the bond. It is not necessary to list employees for the company in order for that bond to apply."

On appeal to this Board, Brock complains that not all of the Bentonite mining claims listed in the mineral claimant's bond are owned by Bentonite; rather, a portion are owned by Meijeh Trust (Meijeh), who "made no application for entry." 5/ As a consequence, appellant asserts that the decision was improper to the extent that it may allow Bentonite onto the Meijeh claims.

5/ Appellant describes Meijeh's mining claims as follows:

"Name of Claim	WMC Serial No.	Description
Mayoworth #7	1 01728	E 1/2 NW 1/4; Section 30, Township 45 North, Range 82 West
Mayoworth #8	1 01729	E 1/2 SW 1/4, Lots 3 and 4 Section, 30, Township 45 North, Range 82 West
Slate Ridge #1	1 01780	S 1/2 NW 1/4, Section 12, Township 44 North, Range 83 West
Slate Ridge #2	1 01781	SW 1/4, Section 12, Township 44 North, Range 83 West
Slate Ridge #3	1 01782	NW 1/4, Section 13, Township 44 North, Range 83 West
Slate Ridge #5	1 01784	E 1/2 NE 1/4, Section 11, Township 44 North, Range 83 West"

Appellant asserts that, of the remaining claims located on Brock lands, Bentonite held eleven-twelfths ownership interest, with Thayer holding a one-twelfth ownership interest. Brock complains that Thayer did not file nor join in the bond for mineral claimants posted by Bentonite, and that the bond was therefore defective because it failed to comply with the requirement imposed by 43 CFR 3814.1(c) that mineral claimants bonds be executed by the mineral claimants themselves as principals. Appellant also argues that, after its filing of a notice of objection on December 4, 19850, BLM solicited ex parte communications from Bentonite concerning the bond and that this conduct has tainted the decisionmaking by BLM and denied Brock procedural due process rights. Finally, Brock objects to the sufficiency of the amount of the $3,500 bond, arguing that this figure can only be justified by a limitation of the acreage to be used by Bentonite to 101 acres, and that such a limitation is beyond the authority of BLM to make, since the bond is clearly executed to insure mining operations on approximately 2,200 acres.

[1] Before the substantive issues raised by this appeal can be considered, there is a procedural question which must be decided. Brock has complained of what it called the "ex parte communications" by which BLM collected information for decisionmaking. This activity is said to "taint" the decision before us on appeal so as to invalidate the action taken. Brock argues that it has been denied prior notice and opportunity to be heard to which it is entitled by the United States Constitution and statutory law governing claims to property rights generally. This allegation of agency impropriety concerns the manner in which information was gathered by BLM, but does not challenge the accuracy of the information, which was apparently supplied by the general manager of Bentonite, Richard L. Thayer.

On November 15, 1985, BLM notified Brock that a bond had been furnished by Bentonite to permit re-entry by Bentonite "for the purpose of prospecting, mining, or removing" Federally owned mineral located on Brock lands in Tps. 45 N., R. 83 W., and 44 N., R. 82 W. On December 4, 1985, Brock objected in writing to the adequacy of the bond proposed, as previously described in detail. BLM then solicited information from Bentonite in response to Brock's objections. This information took the form of telephonic communication and two letters from Thayer to Wayne Sutherland, a BLM employee. See Appendix "C" to Statement of Reasons. The first letter, dated December 6, 1985, included a map showing that mining by surface excavation was planned for six Bentonite claims in township 45. This letter, which generally conforms to the requirements for mining plans of operations (see 43 CFR 3809.1-5), estimated that 91 acres of Brock land would be disturbed by the initial phase of mining operations, which was planned to extend over 10 years. The letter also explained that Bentonite planned to drill holes on three other claims in anticipation of future mining. This exploratory activity, characterized as "assessment work," was estimated to disturb 10 acres annually. In his December 6 letter, Thayer justified the amount of the bond offered on the ground that it was commensurate with the proposed 10-year plan of operations outlined by him, stating:

> I would like to point out that the $3,500 bond by statute, is intended to cover only crops and/or tangible improvements. On the land in question, the only crop is pasture grass and there are few tangible improvements, the most notable being fences. I feel that the $3,500 is sufficient and hope that this information will help your evaluators arrive at the same conclusions. If a larger bond is determined to be necessary, please let me know and I will purchase the necessary coverage. The bond has an annual premium of $35/$1000 coverage which unfortunately goes to the insurance company and not to the recalcitrant surface owner.

Id. at 2.

Since the actual extent of the annual disturbance is not made clear by the letter of December 6, this matter apparently became the subject of a telephone conversation, which resulted in a second letter, dated December 10, 1985. This telephone conversation is apparently memorialized by the December 10 letter, although it is still not clear how much land will be disturbed by Bentonite in the first year and each succeeding year of operations. BLM seems to have concluded however, that only 101 acres would be disturbed altogether, apparently in reliance upon information supplied by telephone. Both letters from Bentonite and the maps furnished with the letters were supplied by BLM to Brock with the December 23, 1985, decision approving the bond.

While it is obviously correct that there was no formal adjudicatory proceeding conducted before BLM's Buffalo Resource Area office, and that Brock was not permitted to offer witnesses and cross-examine Bentonite's employees, the fact-finding conducted by BLM was open and proper. Brock was informed of the statements made by Bentonite and was served with a copy of the bond as required by Departmental regulation 43 CFR 3814.1(c), which implements the statutory bonding requirements in nearly verbatim terms. See 43 U.S.C. § 299 (1982). Nevertheless, Brock complains that BLM did not provide it with a copy of the map submitted by Bentonite detailing its proposed operations. In view of the fact that we are remanding this case for further action, any defect in the notice-giving procedures previously employed by BLM will be corrected on remand. BLM shall provide notice to all parties concerned of every communication needed in further adjudications concerning this matter.

Although the Department has published a rule entitled Ex parte communications at 43 CFR 4.27(b), this rule does not affect BLM investigations, but serves only to bind employees of the Office of Hearings and Appeals (OHA) to insure that private conversations concerning the Merits of pending appeals are not carried on between OHA employees and a party to an appeal without the knowledge and participation of other concerned parties. This rule does not apply to BLM, which is not bound to the formal decisionmaking required of this Board.

Brock relies explicitly upon the Administrative Procedure Act (APA), 5 U.S.C. § 557 (1982), in complaining that rights conferred by the APA were denied when BLM employees received evidence concerning the disputed bond

without resort to formal hearings procedure. This reliance is misplaced, since section 557 of the APA, by its terms, applies only to those proceedings required by statute to be determined on the record. See 5 U.S.C. §§ 554, 556 (1982); Kaycee Bentonite Corps, 79 IBLA 182, 91 I.D. 138 (1984). The statute governing the bond adjudication proceedings in this case, 43 U.S.C. § 299 (1982), does not require an APA hearing for adjudication of the bond provided for by the statute. In the absence of such a statutory requirement, a formal APA hearing is not required. Elmer Silvera, supra.

Nor does due process require that an individual be given notice and an opportunity for a hearing prior to every adverse initial BLM decision, so long as he is provided with notice and an opportunity to be heard before the decision becomes final. George H. Fennimore, 50 IBLA 280 (1980). Thus, Brock's rights to notice and an opportunity to be heard are safeguarded by the provision of 43 CFR 3814.1 providing for an appeal to this Board, and by 43 CFR 4.21(a) which suspends finality of the BLM decision of December 23, 1985, pending such appeal. 6/ This pending appeal, therefore, cures any lack of opportunity to respond to Bentonite's representations which may have disadvantaged Brock in its dealings with BLM. We shall, therefore, proceed to consider the objections raised by Brock in the light of the entire record before us. Since the factual representations wade by Brock in the statement of reasons furnished in support of appeal are unchallenged, they are accepted for the purposes of this decision as accurate.

[2] Brock contends the mineral claimant's bond is defective because it was not signed by Richard L. Thayer, one of the record mining claim owners, as a principal to be charged. It does appear that Thayer has part ownership of part of the claims. An extract of BLM's research denominated a "geographic index" included in the record on appeal indicates that Thayer is a part owner of the claims at issue, together with Bentonite. The record also contains an affidavit from Thayer stating that he and Bentonite own all the listed claims together. Since 43 CFR 3814.1(c) categorically requires that the mineral entry claimants bond "be executed by the person who has acquired" Federal mineral rights in SRHA lands, and since Thayer is such a person, his failure to join in the bond is an apparent deviation fran the regulatory requirement. It would be inconsistent with the purpose of the bonding requirement to insure the landowner's property rights to excuse some mining claimants from the bonding requirement. Cf. A. J. Maurer, Jr., supra. Neither the regulation nor the statute provides that where there are multiple owners of mining claims on SRHA lands, it is sufficient for only one of the mining claimants to sign the required bond as a principal to be charged. Further, it would not make good sense to do so, since such a practice could permit some members of a group of mining claimants to avoid the effect of the bonding provision, and to perhaps escape liability for conduct for which the individual may have

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6/ It should be noted that 43 CFR 3814.1 provides for appeal to the Director, BLM, rather than to this Board. The regulation codified at 43 CFR 3814.1 was promulgated prior to the creation of this Board and describes an appeals procedure which is no longer in effect. Since none of the limitations upon Board jurisdiction enumerated at 43 CFR 4.410(a) apply, in this circumstance appeal is properly made to the Board.

been responsible. The regulatory requirement for bonding becomes meaningless if some , but not all, of the mining claimants seeking re-entry for mining purposes on SRHA land are required to post the required bond. Thayer must therefore join in the bond, assuming he is still an owner of the claims at issue. The fact that Thayer is also an employee of Bentonite does not excuse compliance with the bonding requirement of 43 CFR 3814.1, so far as his personal interest in the mining claims is concerned, and it was error to excuse him for this reason from compliance with the regulatory requirement. On remand he will be joined as a principal to be charged, unless it then appears of record that his interest in the claims has been extinguished.

[3] In effect, Brock contends that the mineral claimants bond is, alternatively, inadequate in amount or does not conform to the actual plan for mining outlined in the two letters of December 6 and 10, 1985, furnished by Bentonite to BLM. The parties seem to be agreed that the annual value of the use of an acre of Brock's grazing land is $2. 7/ In the mineral claimant's bond approximately 2,200 acres of land are described as subject to Bentonite's claims. In the plan of operations outlined to BLM by Bentonite, however, only 91 acres are planned to be developed by full mining operations. 8/ The Board's decision in A. J. Maurer, Jr., supra, demonstrates, however, that the miner's planned activities are not the critical factor in determining the amount of a bond to be set. The concurring opinion in Maurer emphasizes this aspect of re-entry upon SRHA lands, observing that the amount of the bond to be furnished by the locator" * * * does not depend upon his proposed activities upon the patented land, but, rather, upon possible damages based upon the value of the crops and surface improvements of the surface owner within the mining claims * * * and the grazing value of the land." Id. at 159. The bond must be based, therefore, upon the claims to be entered, not upon the area of planned mining operations proposed by the mineral applicant. It is not clear which lands Bentonite plans to enter, since it appears that some of the claims are not owned by Bentonite and that Bentonite does not plan to enter all the claims which may be owned by it. Here, therefore, it is apparent that the mineral claimants' bond should be modified to conform to the claims actually sought to be entered by Bentonite and Thayer.

7/ BLM's decision, however, states that BLM "calculations show 'agricultural rental use' values less than * * * $2.00 per acre per year." The Board does not reach the question of the actual value of the Brock land for bonding purposes, since Brock has not supplied any evidence on this issue, and since BLM's estimate seems to be based upon regulatory provisions establishing charges for BLM grazing fees which may not amount to fair market value.

8/ Brock also contends that the mineral claimants bond is defective because it purports to insure against damage to crops and improvements upon lands not claimed by Bentonite and not subject to the proposed operations and mining plan of operations. These are the Meijeh lands comprising 720 acres. In the absence of a showing that Bentonite claims some interest in the Federal minerals under these lands, there is no provision of 43 U.S.C. § 299 (1982) or 43 CFR 3814.1 which would allow the inclusion of these lands in the bond for mineral claimants

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded to permit Bentonite, or whoever owns the claims sought to be entered to identify which claims are intended to be entered. BLM is directed to determine possible damages to crops, surface improvements or grazing value of the land so identified and to use this computation to set the amount of the bond, to which all mining claim owners shall be bound as principals to be charged.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge